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No. 79-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STUART RICHARD COHEN,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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REPLY BRIEF OF PETITIONER

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Respondent's Brief in Opposition ("Br. in Opp.") primarily attempts to dilute the impact of prosecutorial misconduct, the occurrence of which it cannot directly deny. This Reply will stress a few points useful in keeping matters in correct perspective and showing the illogic of Respondent's principal contentions.

1. Respondent denies that describing the electric chair and the smell of burning flesh to witnesses constituted a "threat." But such actions undisputedly had the effect of reducing the prosecution's chief witness to tears and eliciting statements inculpatory of Peti-

tioner Stuart Richard Cohen. Respondent is far off the mark in caviling about the "context" of this heinous activity. It is completely unexplainable *except* as a deliberate coercion of the witnesses, and could have had no other purpose.[1] Thus the issues set forth in the Petition as to whether such conduct requires dismissal of the indictment are squarely presented.

2. Respondent does not deny the impropriety of the prosecutor's extraordinary promise to key witness Anthony Reynolds to confer with the judge and "determine what could be done for Mr. Reynolds" (R. 35a).[2] This was *not* a usual plea bargain in which a prosecutor agreed to make a formal recommendation, but rather implied a special relationship with, and ability to obtain results from, "the Judge." Respondent notes (Br. in Opp., p. 3) that the promise was not carried out. Respondent does not explain how that makes it any less a part of a pattern of coercive threats and inducements.

3. Although acknowledging another procedural impropriety, Respondent is unable fully to agree with the testimony of the President Judge of the Court of Common Pleas (R. 55a) that the release from prison of Geisler, by means of the Assistant District Attorney's signing as surety, was "highly improper." It may be, as Respondent urges (Br. in Opp., p. 4) that any distraught felon "would benefit" from a release

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[1] That one witness, Jack Geisler, later accommodated the prosecutor by denying that he was "threatened" only underscores the completeness of the intimidation.

[2] "R." refers to the Appendix filed in the Supreme Court of Pennsylvania.

from incarceration, but it is extraordinary, and coercive, lenity for a prosecutor personally to sign out an accused murderer in this manner.

4. Respondent is incorrect in asserting (Br. in Opp., p. 5) that the record "contains no evidence that the district attorney instructed a potential witness not to speak to defense counsel prior to trial" and that there is "no evidence in the record that petitioner's counsel or investigators ever made an attempt to speak with Abraham or any other witness prior to trial." The undisputed evidence on this point, including affidavits of defense counsel, instead shows that witness Richard Wamsher, when approached by defense counsel, directly stated that he had received such instructions (R. 548a, 549a) and that the instructions to turnkeys quoted in the Petition (p. 6) applied generally (R. 461a). A belated order at trial that the prosecutor stop this outrage does not negate the fact of wilful pretrial obstruction of the defense.

5. Respondent admits (Br. in Opp., p. 6) that the District Attorney ordered the police prosecutor not to keep daily police records of the investigation, in contravention of normal practice. Respondent's excuse for this deliberate scrapping of orderly procedures—that police reports might leak to the public—on its face is disingenuous and unworthy. It ill behooves a prosecutor to so demean the responsibility of police officials. Coming from one who had severe investigatory excesses to conceal the excuse is particularly unacceptable if not incredible. Orderly procedure is the lifeblood of the law and the essence of due process; "[t]he history of liberty has largely been the history of ob-

servance of procedural safeguards", *McNabb* v. *United States,* 318 U.S. 332, 347 (1943) (Frankfurter, J.).[3]

6. The egregiously improper trial presentations of the prosecution are amply documented, through extensive quotations in the Petition. Those materials on their face show the deliberate and repeated character of this aspect of the misconduct, and refute any notion that it was "harmless." How, for example, can it be urged that repeated statements of the prosecutor to the effect that he "would not knowingly put a liar on the witness stand" (R. 485-486a) "were not so strong or abusive that they incited prejudice in the eyes of the jurors" (Br. in Opp., p. 7)? As on other matters, Respondent's arguments that somehow there is doubt as to the "context" of such trial conduct, are baseless. The context, and natural result, of such textbook overreaching of a prosecutor, was without subtlety: at every stage of the trial he tried to influence the jury improperly by placing the imprimatur of himself and his office upon the credibility of his admittedly (Br. in Opp., p. 3) "less than savory" witnesses, and otherwise injecting irrelevant prejudicial matter into the case.

* * * *

The faint effort of Respondent to diminish the importance of the Due Process and Double Jeopardy issues presented by the Petition is without substance. Whether those fundamental Constitutional doctrines

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[3] The prosecutor's orders in this regard not only prevented the compilation of a written record of investigatory excesses, but limited possible judicial scrutiny of official records for materials which would have had to be made available to the defense under *Brady* v. *Maryland,* 373 U.S. 83 (1963), and *Jencks* v. *United States,* 353 U.S. 657 (1957).

are offended by a reprosecution in the face of the most egregious forms of prosecutorial misconduct is a matter which, Petitioner submits, warrants plenary review by this Court. Notwithstanding the arguments of Respondent, this case implicating the very integrity of judicial proceedings is an appropriate one for this Court to give content to the principles stated in such cases as *United States* v. *Russell,* 411 U.S. 423, 431-432 (1973); and *Arizona* v. *Washington,* 434 U.S. 497, 508-509 (1978), as discussed in the Petition (pp. 13-15).

CONCLUSION

For the reasons stated above, and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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